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IN THE

Supreme Court of the United States

October Term, 1962

No. 322

ALEXANDER T. SPERRY,
Petitioner,

-vs-

STATE OF FLORIDA, ex rel., THE FLORIDA BAR,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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PRELIMINARY STATEMENT

In this brief we will refer to pages in the brief and petition of petitioner as "P.B.__" and to the appendix to the petition and brief of petitioner as "P.A.__."

No appendix is attached to this brief in opposition to granting the petition for certiorari.

ARGUMENT

The Regulation of the Practice of Law in the State of Florida

Section 23 of Article V of the Constitution of the

State of Florida vests in the Supreme Court of that state full power over the subject-matter of this suit, said section being as follows:

> "The Supreme Court shall have exclusive jurisdiction over the admission to the practice of law and the discipline of persons admitted ***."

Section 2 of Article II of the Integration Rule of The Florida Bar provides that

> "No person shall engage in any way in the practice of law in this state unless such person is an active member of The Florida Bar in good standing ***." (P. A. 11)

The Law of Florida in Relation to This Case

The Supreme Court of Florida, in the exercise of its power under the Constitution of Florida, has determined the law of such state in relation to this case in the decision appealed from, said opinion appearing in full in the appendix to petitioner's petition (P.A. 12-33), and in and by said decision has determined the law of Florida as follows:

(a) That the Supreme Court of Florida has jurisdiction of the parties and subject-matter of this suit.

(b) That the actions of the petitioner in

(1) Using the term "patent attorney";

(2) Rendering legal opinions, including

opinions as to patent-ability or infringement on patent rights;

(3) Preparing, drafting and construing legal documents;

(4) Holding himself out, in this state, as qualified to prepare and prosecute applications for letters patent, and amendments thereto; and

(5) Preparation and prosecution of applications for letters patent, and amendments thereto, in this state. (P.A. 32-33) constitute the practice of law in the State of Florida and are prohibited unless the practitioner is a member of The Florida Bar in good standing.

The Rights or Privileges of Petitioner

The Supreme Court of Florida has determined that under Florida law the petitioner can not do the things enumerated in the preceding section of this brief in the State of Florida because he is not a member of The Florida Bar in good standing.

The petitioner contends that he has the privilege or right to do the things above enumerated in the State of Florida because he has been admitted to practice before the Patent Office pursuant to an Act of Congress.

Because the Constitution of the United States and the laws of Congress pursuant thereto are the supreme law of the nation and the states, we must measure the

rights and privileges of petitioner accordingly as they are measured to him by such Constitution and laws, recognizing that the laws of Florida must yield to the intent of the Constitution and the valid acts of Congress, but also recognizing that where the laws of Florida have not been suspended or superseded by federal law, that the laws of Florida are controlling.

We must, therefore, look to the Act of Congress to determine the full intent of Congress in regard to the privileges that have been conferred upon petitioner because the Commissioner of the Patent Office can not grant to petitioner any greater privileges than authorized by the Congress.

The relevant portions of the Act of Congress and the regulations of the Commissioner of the Patent Office upon which petitioner's contention is based, are as follows:

> "Patent Act of 1952, c. 950, 66 Stat. 792, Secs. 31-33, 35 U.S.C. Secs. 31-33.
>
> Sec. 31. The Commissioner, subject to the approval of the Secretary of Commerce, may prescribe regulations governing the recognition and conduct of agents, attorneys, or other persons representing applicants or other parties before the Patent Office, and may require them, before being recognized as representatives of applicants or other persons, to show that they are of good moral character and reputation and are possessed of the necessary qualifications to render to applicants or other persons valuable

service, advice, and assistance in the presentation or prosecution of their applications or other business before the Office."

* * * *

"Rules of Practice of the United States Patent Office in Patent Cases, 24 F.R. 10332, 37 CFR Secs. 1.31, 1.341-1.348.

Sec. 1.31 Applicants May be Represented by an Attorney or Agent. An applicant for patent may file and prosecute his own case, or he may be represented by an attorney or agent authorized to practice before the Patent Office in patent cases. The Patent Office cannot aid in the selection of an attorney or agent.

Sec. 1.341. Registration of Attorneys and Agents. A register of attorneys and a register of agents are kept in the Patent Office on which are entered the names of all persons recognized as entitled to represent applicants before the Patent Office in the preparation and prosecution of applications for patent. Registration in the Patent Office under the provisions of these rules shall only entitle the persons registered to practice before the Patent Office.

(a) Attorneys at Law. Any attorney at law in good standing admitted to practice before any United States Court or the highest court of any State or Territory of the United States who fulfills the requirements and complies with the pro-

visions of these rules may be admitted to practice before the Patent Office and have his name entered on the register of attorneys.

(b) Agents. Any citizen of the United States not an attorney at law who fulfills the requirements and complies with the provision of these rules may be admitted to practice before the Patent Office and have his name entered on the register of agents." (P.A. 1-3)

The Question Presented Herein

The question presented in this cause is whether or not the petitioner may do and perform acts constituting the practice of law in the State of Florida by virtue of his admission to practice before the Patent Office despite the fact that he is prohibited by the laws of Florida from doing and performing such acts in such state.

The Role of the States in Regulating the Practice of Law

We believe it may be said with ample justification that there is no state power, no state function and no state responsibility of greater importance, or that has been exercised and performed more consistently by the states, or has been more uniformly recognized and acquiesced in than the power and responsibility of the states to regulate the practice of law within the respective boundaries.

We believe that it also may be said with justification that no power and responsibility of the states is so closely

related to the welfare of the people and the preservation and protection of their personal and political rights as is the power and responsibility to regulate and supervise the practice of law.

The privileges, the duties and the responsibilities of those admitted to the practice of law are so intimately related to the performance by the state of the essential governmental function of administration of justice, the preservation of the confidence of the people in the courts, and the protection and preservation of personal and political rights that every state has, and of necessity must exercise the power to control and regulate the practice of law and those admitted to such practice within its boundaries.

No other power or right of the states has been so uniformly recognized nor generally acquiesced in by the departments, agencies and Courts of the federal government as the right and power of the states to control and regulate the practice of law, and those admitted to such practice within their respective boundaries.

The generally accepted standard for admission to practice before the federal courts and the several state agencies is that the applicant for such privileges is admitted to the practice of law before the highest courts of his state.

The rules of this Court provide that:

> "It shall be requisite to the admission of attorneys or counselors to practice in this Court, that they shall have been such for three years passed

> in the highest Court of a state, territory, district, commonwealth or possession, and that their private and professional characters shall appear to be good."

Traditionally, historically and as a matter of necessity to preserve and protect the welfare of its people, each state has exercised its power in this field.

In the light of this background and with the pronouncement of this Court as guidelines we will hereafter examine the above quoted Act of Congress to determine the question involved herein.

Constitutional Principles Involved

There is no doubt that Congress, in the exercise of powers delegated to it, may and can suspend, supersede or set aside any state law in conflict with the purpose and intent of Congress but such purpose and intent must be clearly manifested.

Our system of dual sovereignty, which is the unique feature and fundamental basis of the federal union, is established by the Constitution of the United States and the reserved rights and powers of the states are as much within the protection of the Constitution as are the rights of Congress to exercise the powers delegated to it.

Decisions of this Court

In recognition of and deference to the constitutional principles above set forth, this Court has consistently given full effect to the supremacy clause in the Consti-

tution of the United States when the purpose and intent of Congress to preempt any field within the range of the powers delagated to it was clearly manifest, but this Court has also, with equal recognition of and deference to the aforesaid constitutional principles held that the intent and purpose of Congress to exercise its powers and the degree to which it is the intent and purpose of Congress to exercise such powers, must be manifest in the Acts of Congress and this Court will give no greater effect to such acts than was intended by Congress as manifested in such acts.

In other words, supremacy of federal law may be asserted and made effective, but such supremacy is never presumed.

This rule of interpretation has been expressed by this Court in numerous cases.

In the case of Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943), this Court said:

> "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, United States v. Borden, 308 US 188, 198, 199, 84 L. ed 181, 190, 191, 60 S Ct 182; United States v. Jackson, 302 US 628, 631, 82 L. ed 488, 491, 58 S Ct 390; Posadas v. National City Bank, 296 US 497, 503-505, 80 L. ed 351, 355, 356, 56

S Ct 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation."

In the case of California v. Zook, 336 U.S. 725 (1949), this Court said:

"While the statute says nothing expressly on this point and we are aided by no legislative history directly in point, we know that normally congressional purpose to displace local laws must be clearly manifested. H. P. Welch Co. v. New Hampshire, 306 US 79, 83 L ed 500, 59 S Ct 438, and cases cited; Maurer v. Hamilton, 309 US 598, 614 L ed 969, 980, 60 S Ct 726, 135 ALR 1347; Kelly v. Washington, 302 US 1, 11, 14, 82 L ed 3, 11, 13, 53 S Ct 87; Mintz v. Baldwin, 289 US 346, 77 L ed 1245, 53 S Ct 611. Or if the claim is conflict in terms, it 'must be clear that the federal provisions are inconsistent, with those of the state to justify the thwarting of state regulation.' Cloverleaf Butter Co. v. Patterson, supra (315 US at 156, 86 L ed 762, 62 S Ct 491). See also Hines v. Davidowitz, 312 US 52, at 67, 85 L ed 581, 586, 61 S Ct 399."

In the case of Schwartz v. Texas, 344 U. S. 199, 73 S. Ct. 232 (1952) this Court said:

"If Congress is authorized to act in a field, it should manifest its intention clearly. It will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of in-

tention to do so. The exercise of federal supremacy is not lightly to be presumed.

'The principle thus applicable has been frequently stated. It is that the Congress may circumscribe its regulation and occupy a limited field, and that the intention to supersede the exercise by the State of its authority as to matters not covered by the federal legislation is not to be implied unless the Act of Congress fairly intrepreted it in conflict with the law of the State,' Atchison, T. & S. F. R. Co. v. Railroad Commission, 283 US 380, 392, 393, 75 L ed 1128, 1136, 1137, 51 S Ct 558. See Savage v. Jones, 225 US 501, 533, 56 L ed 1182, 1194, 32 S Ct 715.

'It should never be held that Congress intends to supersede or by its legislation suspend the exercise of the police powers of the States, even when it may do so, unless its purpose to effect that result is clearly manifested.' Reid v. Colorado, 187 US 137, 148, 47 L ed 108, 114, 23 S Ct 92."

Other Considerations

We have heretofore set forth and discussed the decisions of this Court establishing guidelines for the interpretation of Acts of Congress relating to areas in which the states have an interest and in which they have powers of regulation.

This Court has clearly set forth the rule that any intent or purpose of Congress to suspend, supersede or

set aside state law in such areas must be clearly manifest in the Act of Congress.

We suggest as a corollary to that rule and as a logical extension of it that in those areas where the interest of the states is acute, where regulation by the states is most essential to the public welfare and where the power of the states has been recognized and acquiesced in for a long period of time, the more strict should be the interpretation of any Act of Congress against interference with state law and the more clearly should the intent and purpose of Congress appear before state laws in such areas are suspended, superseded or set aside.

We submit that the regulation of the practice of law by the state falls clearly within the rule laid down by this Court for interpretation of the laws of Congress and further submit that the right and power of the states to regulate the practice of law also falls within the extension of the rule as above suggested.

We also respectfully submit a further reason to this Court why the Act of Congress upon which petitioner relies should be strictly construed against his contentions. Any intent of Congress to suspend, supersede or set aside state law should more clearly appear in those areas where the states have a duty to protect its citizens than in acts of Congress relating to subjects vital to the functioning of the Federal Government or in which the Federal Government has primary responsibility.

Again we submit that the regulation and control of the practice of law by the states falls clearly within this suggested extension of the rule already enunciated by this Court.

The Act of Congress and the Interpretation Thereof

We have already quoted the relevant portions of the Act of Congress and the regulations relied upon by the petitioner. We have already stated that the Commissioner has no power by regulation to suspend, supersede or set aside state laws unless such power is expressly conferred upon him by Congress or is necessarily implied therefrom.

It would seem therefore that we need only to examine the Act of Congress to determine the issues herein.

It is immediately apparent that there is no express provision in the Act providing that state laws shall yield to the federal statute; there is no express provision that the powers vested in the Commissioner are powers that shall transgress state laws or that the privileges he may confer may or shall be enjoyed or exercise contrary to any state laws or in violation of any state law, nor is there any provision in the federal statute exempting patent attorneys or agents from the effect of state laws upon the same subject-matter.

It is also immediately apparent that the subject of the Act of Congress does not relate to any essential function of the Federal Government; it relates only to the granting of a privilege to persons to appear before a federal agency. It does not relate to the functioning of the agency nor to those charged with responsibility for its operation—the subject is simply one of granting privileges to persons to appear in a representative capacity before the agency.

It also immediately appears that Congress did not

consider the granting of the privilege of practicing before the Patent Office to persons who were not lawyers to be essential to the continued existence of the Federal Government nor to the national welfare, nor even to the functioning of the Patent Office—the Act of Congress is purely permissive—it is not mandatory that the Commissioner grant the privileges authorized by the Act—certainly there is no express command that the Commissioner suspend, supersede or set aside long established traditions and laws of the states and confer the privilege of practicing law upon persons prohibited from so doing by state laws.

We further submit that it is appropriate in determining the purpose and intent of Congress to give consideration to matters of public policy. It is a fundamental principal of our constitutional system that each of the governments, state and federal, are to exercise their powers so as not to interfere unnecessarily with the exercise of the powers of the other.

This Court has said, in the case of South Carolina v. U. S., 199 U.S. 437 (1905):

> "In other words, the two governments—national and state—are each to exercise their powers so as not to interfere with the free and full exercise by the other of its powers."

It would appear then that this principle requires that the statute involved herein should be so construed as to give only that effect to the statute that will not authorize interference with the traditional and historic powers of the states to regulate the practice of law within their boundaries.

It might also be fair to assume in considering the interpretation of the Act of Congress that if a factual situation existed that Congress deemed of such urgency to compel it to the conclusion that it was essential to the national welfare or to the proper functioning of the federal agency involved to confer privileges upon individuals to practice patent law in the several states in disregard of the law of those states, that Congress would have resorted to the common legislative device of incorporating in the statute a finding or declaration of such factual situation, but no such finding or declaration appears in the statute.

After this brief in opposition to the Petition for Writ of Certiorari had been prepared, counsel by agreement received an unprinted copy of proposed brief to be filed as amicus curiae on behalf of American Association of Registered Patent Attorneys and Agents and of Committee For Southern California Patent Practitioners, Not Members of the California Bar. A statement is made in that brief:

> "The decision of the Florida Court deprives many individuals, other than the petitioner, of the right to represent applicants in the preparation and prosecution of applications in the United States Patent Office."

This was obviously not the purpose or intention of the Florida Supreme Court, for when it was discussing petitioner's rights under the Florida decision it observed:

> "Nor will it in any way affect his right to practice before the Patent Office in Washington, D. C." (P.A. 32)

CONCLUSIONS

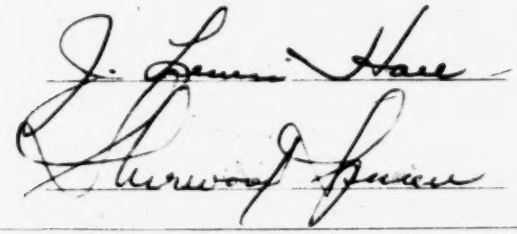
We therefore submit that there is no provision in the Act of Congress supporting petitioner's contention that he may engage in activities in the State of Florida prohibited by the laws of that state, nor is there any justification by implication in the statute that petitioner should be permitted to engage in activities prohibited him by Florida law.

We submit that it was and is the intent of Congress to authorize the privileges contemplated in the congressional statute only when such privileges may be exercised without violation of state law.

It appears then that there is no error in the judgment of the Supreme Court of Florida and the petition for certiorari should be denied.

DATED at Hollywood, Florida, September 6, 1962.

Respectfully submitted,



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I HEREBY CERTIFY that copies of the foregoing brief have been served upon counsel for petitioner by mail, by depositing the same in the United States mail, addressed as follows: Oscar A. Mellin, LeRoy Hanscom, Jack E. Hursh, 111 Sutter Street, San Francisco 4, California, the same being the post office address of such counsel and that sufficient air mail stamps were placed thereon to insure delivery, and that such copies addressed and stamped as aforesaid were deposited in the United States mail on the 6th day of September, A. D. 1962.
A. D. 1962.